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No. 94-864

In The

# Supreme Court of the United States

October Term, 1994

BRUCE PHILIP LARSON,

*Petitioner,*

v.

GERALD NUTT, Sheriff, Martin County,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Does the Confrontation Clause allow admission of the out-of-court statements of a non-testifying child without a showing of "unavailability," where her statements otherwise meet the reliability requirements of *Idaho v. Wright*, under either a "firmly rooted" exception or a "particular guarantees of trustworthiness" analysis?

II. Whether an unavailability analysis is even relevant for admission of otherwise reliable out-of-court statements under the Confrontation Clause where the child witness was in fact produced at trial by the prosecution, unexpectedly found competent, and thus equally available to the defense had it chosen to call her for cross-examination?

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case. The opinion of the Eighth Circuit Court of Appeals is reported at 34 F.3d 647 (8th Cir. 1994). A copy of the slip opinion is reproduced in the Appendix to the petition at pages B1-B7. ("Pet. App.")

## STATEMENT OF THE CASE

This child sexual abuse case began on May 1, 1987, when B., a girl then less than four years old, reported

sexual contact by her father (petitioner Larson) to a physician's assistant during a medical examination at a family practice clinic (T. 172-177).[1] B. had previously complained of vaginal soreness and burning urination and was taken to the clinic for an exam by her mother (T. 172).

The physician's assistant conducting the exam observed redness and swelling around the vaginal opening (T. 173). The examiner, after first asking "Have you ever been touched there?" then asked B. "who" had touched her (T. 176). In response, B. said that "Daddy" had touched her with "his bone" that "came out of his pants" (T. 176-177). B. told the examiner that it had hurt and she had asked him to stop.

Subsequent investigation, which included three other out-of-court statements by B. to medical personnel and to investigators (one of which was a video-taped interview), led to a complaint being filed on December 15, 1987, charging petitioner with criminal sexual conduct against B.

Because of the prosecutor's good faith belief that B., because of her young age, was incompetent to testify, the State's professed intention from the beginning of the prosecution was to rely solely on the out-of-court statements of B. rather than calling her personally as a witness at trial (*e.g.*, 1st O.H. 3; 2d O.H. 4; T. 13-14, 154).[2] B. was

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[1] "T." refers to the trial transcript.

[2] "1st O.H." refers to the transcript of the first omnibus hearing held on June 15, 1988. "2nd O.H." refers to the transcript of the reconvened omnibus hearing held on August 19, 1988.

only three years old at the time of the abuse, and had only recently turned five years old by the trial. Therefore, the prosecutor had serious concerns about her ability to remember and relate facts concerning the incident (1st O.H. 3; T. 33). These concerns were bolstered by the opinion of a psychotherapist (1st O.H. 3).

Prior to trial, at the June 15, 1988 omnibus hearing, petitioner moved to suppress the out-of-court statements made by B., on the ground that his right to confrontation would be denied. The parties assumed for purposes of the hearing that B. was incompetent. The trial court ruled that the out-of-court statements were reliable, corroborated, and admissible under Minn. Stat. § 595.02, subd. 3 (1988).[3]

At the August 19, 1988 reconvened omnibus hearing, petitioner renewed his motion to suppress B.'s out-of-court statements on constitutional grounds, based on this Court's then recent decision in *Coy v. Iowa*, 487 U.S. 1012 (1988). The trial court again denied petitioner's motion to suppress B.'s out-of-court statements, finding that *Coy* did not apply.

This remained the state of the evidentiary questions until August 30, 1988, the first day of trial. On that day petitioner informed the trial court that he intended to call B. as a witness (T. 14-16). Therefore, the trial court arranged a competency hearing in chambers before the trial would commence (T. 15). The trial court explained that "it is understood that neither party – if the Court

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[3] The text of Minn. Stat. § 595.02, subd. 3 (1988) is set forth in Pet. App. F-2 to F-4.

finds [B.] competent . . . has to call her if they don't wish to do so" (T. 16).

B. was produced by the State for the competency hearing (T. 25). Despite the concerns of the State as to her ability as a witness (T. 15, 33, 38), B. was declared competent by the trial court (T. 45). However, in making its competency ruling, the trial court recognized that B.'s ability to remember was very limited (T. 44-45).

In any event, neither the State nor petitioner called B. as a witness during the course of the four-day trial. The State did not call her in accord with its professed concern whether B. had the ability to present any relevant evidence (T. 154). Instead, the State introduced B.'s out-of-court statements.[4] The defense failed to call B. for reasons not apparent in the record. However, petitioner did call twelve other witnesses, including petitioner himself (T. 459).

On September 3, 1988, the jury found petitioner guilty of criminal sexual conduct in the second degree (T. 664). On direct appeal the Minnesota Court of Appeals remanded the case, concluding that admission of B.'s out-of-court statements was prejudicial error if she had been properly ruled competent, but that the competency ruling therefore had to be re-examined in that light. *State v. Larson*, 447 N.W.2d 593, 598-599 (Minn. Ct. App. 1989), *rev. granted* (Minn. Dec. 15, 1989).

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[4] Prior to commencement of the trial petitioner's defense counsel withdrew his Confrontation Clause objection to the video-taped interview of B., explaining: "because it is our desire that the video tape be admissible into evidence" (T. 9).

However, on further review by the Minnesota Supreme Court, the Court of Appeals was reversed and petitioner's conviction was affirmed. *State v. Larson*, 453 N.W.2d 42 (Minn. 1990), *rehr'g denied* (Minn. May 15, 1990) (*"Larson I"*).

A petition for a writ of certiorari was subsequently filed by petitioner with this Court. On October 1, 1990 an order was entered granting the petition for the purpose of remanding the case back to the Minnesota Supreme Court for further consideration in light of this Court's then recent decision in *Idaho v. Wright*, 497 U.S. 805 (1990). *Larson v. Minnesota*, 498 U.S. 801 (1990).

On remand, the Minnesota Supreme Court asked for further briefs and heard additional oral argument. On July 12, 1991 it filed its decision holding that: "After careful reconsideration of the case in light of *Wright*, we reaffirm the judgment of conviction." *State v. Larson*, 472 N.W.2d 120, 122 (Minn. 1991) (*"Larson II"*).[5]

Petitioner then filed a second petition for writ of certiorari in this Court on September 19, 1991. In that petition he specifically cited the case of *White v. Illinois*,

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[5] Unfortunately, in petitioner Larson's statement of the case he incorrectly asserts that the Minnesota Supreme "court focused on the admissibility of the statements under the Minnesota Rules of Evidence, including the catch-all exception, . . . " (Petition at 8). While the Minnesota Supreme Court obviously had to deal with the evidentiary issues, it did not limit its focus to them. Rather, the Minnesota Court expressly addressed and decided all the Confrontation Clause issues raised by petitioner, particularly in *Larson II*, 472 N.W.2d at 123-128.

500 U.S. 904 (1991) (*cert. granted*), which was then pending before this Court.

On January 5, 1992, this Court decided the *White* case, holding that out-of-court declarations which bear "substantial guarantees of their trustworthiness" (such as those which come within firmly rooted exceptions to hearsay rule) are admissible under the Confrontation Clause without the need for a showing of unavailability. *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 742-43 (1992).

Twelve days later, on January 7, 1992, this Court denied petitioner's second request for a writ of certiorari in this case. *Larson v. Minnesota*, ___ U.S. ___, 112 S. Ct. 965 (1992).

Petitioner next filed a Petition for Writ of Habeas Corpus in the United States District Court. On October 22, 1993, the federal magistrate judge filed a Report and Recommendation that the writ be denied. Petitioner filed objections to the Report and Recommendation, but on November 23, 1993 the Honorable David S. Doty, Judge of United States District Court, issued an Order adopting the Report and Recommendation, and denying the application for a writ of habeas corpus.

An appeal to the Eighth Circuit followed. On September 1, 1994, the Eighth Circuit affirmed the district court's denial of relief. *Larson v. Nutt*, 34 F.3d 647 (8th Cir. 1994).

## REASONS FOR DENYING THE WRIT

### I. INTRODUCTION.

The writ should be denied in this case because there exist no "special and important reasons" for the exercise of this Court's discretionary power of review. U.S. Sup. Ct. Rule 10.1. The questions presented by petitioner were correctly decided by the Eighth Circuit based upon a fair and reasonable reading of this Court's decision in *White v. Illinois*, 502 U.S. 346 (1992), a decision in full accord with prior Confrontation Clause cases. Nor is there any clear split of authority among the lower courts over *White's* rejection of a general unavailability rule.

Further, the narrow factual situation presented by this case (where the very young child witness was actually "produced" at the courthouse by the prosecution, but where the defense nevertheless refused to call her for cross-examination) is so unique, and so unlikely to recur with any regularity, that it does not form the basis for any nationally important question.

The long procedural history of this case, through virtually every level of state and federal review, including two prior trips to this Court, amply demonstrates the care and correctness going into the result reached by the Eighth Circuit below. As such, this case simply does not give rise to a "substantial" federal question as defined by Justice Frankfurter in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not

> sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted.] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

*Id.* at 74.

The questions presented herein are already so well settled, and so based on the particular facts of this case, as to be deemed merely "academic" or "episodic" in nature. The petition should therefore be denied.

## II. THE EIGHTH CIRCUIT PROPERLY READ *WHITE V. ILLINOIS* AS DECLINING TO ADOPT AN UNAVAILABILITY RULE FOR ALL OTHERWISE ADMISSIBLE HEARSAY THAT CARRIES "SUFFICIENT INDICIA OF RELIABILITY," NOT JUST HEARSAY ADMITTED UNDER "FIRMLY ROOTED" EXCEPTIONS.

In *White v. Illinois,* this Court declined to adopt a general unavailability rule for Confrontation Clause purposes. It did so because of the evidentiary value of all otherwise admissible hearsay statements which provide "substantial guarantees of trustworthiness," and thus "carry sufficient indicia of reliability." 502 U.S. at ___, 112 S. Ct. at 742, n.8, and 743. Under this reasoning, it simply makes no constitutional difference whether the hearsay fits either a "firmly rooted" or some other exception, so long as the statements are trustworthy and reliable.

The Eighth Circuit correctly recognized this principle both in the case at hand, and in its prior decision upon which it relied herein: *Ring v. Erickson,* 983 F.2d 818, 819-20 (8th Cir. 1992). The Eighth Circuit's decision

herein conforms with the basic proposition that so long as hearsay evidence is "trustworthy" and "reliable" it meets the basic concerns of the Confrontation Clause. *See Idaho v. Wright*, 497 U.S. 805, 815 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

A reading of *White* confirms this analysis The defendant in *White* had opposed introduction of the young victim's two out-of-court statements that were otherwise reliable because they came under firmly rooted exceptions to the hearsay rule, arguing that the Confrontation Clause required the prosecution to either produce the young girl, or demonstrate her unavailability. *White*, 502 U.S. at ___, 112 S. Ct. at 740. This Court, however, rejected defendant's proposed unavailability rule, stating that "[U]navailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *Id.* at 741, citing *United States v. Inadi*, 475 U.S. 387 (1986). This Court went on to hold that "trustworthy" statements, like those coming under the firmly rooted exceptions at issue, do not require an unavailability analysis, saying that:

> Given the *evidentiary value* of such statements, *their reliability* and that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs, we see no reason to treat the out-of-court statements in this case differently from those we found admissible in *Inadi*.

*White*, 502 U.S. at ___, 112 S. Ct. at 743 (emphasis added).

In reaching its decision this Court based its analysis on the fact that the statements in question had sufficient "indicia of reliability" to meet the overall requirements of the Confrontation Clause. *Id.* at 742, n.8. Of course, they satisfied the reliability criterion because they came within "firmly rooted" hearsay exceptions. But nowhere does *White* limit its reasoning to that narrow category. Rather, it is the overall "reliability" requirement which is the key.

It is already well-established that "reliability" is not met solely by firmly rooted exceptions. Rather, this Court has made it clear in a number of cases that adequate indicia of reliability can be obtained by *either* a firmly rooted exception, *or* by "a showing of particularized guarantees of trustworthiness." *Idaho v. Wright*, 497 U.S. at 815; *Ohio v. Roberts*, 448 U.S. at 66. Indeed, *White* itself was but an application of those principles in the particular context of the two firmly rooted hearsay exceptions at issue therein. *White*, 502 U.S. at ___, 112 S. Ct. at 743. Likewise, the Eighth Circuit correctly applied the same analysis to the out-of-court statements in the case at hand, agreeing with the Minnesota Supreme Court in *Larson II* that the relevant statements had particular guarantees of trustworthiness. Pet. App. B-5.

In sum, the questions presented herein are already decided, and there is no basis for further review by this Court.

## III. THE LOWER COURT CASES CITED BY PETITIONER DO NOT REPRESENT A CLEAR SPLIT OF AUTHORITY OVER THE UNAVAILABILITY RULE REJECTED IN *WHITE V. ILLINOIS.*

In his petition at pages 14-17, petitioner cites a number of state and federal circuit cases for the proposition that "the issue presented in petitioner's case is a recurring one of national significance, involving a major disagreement about a rule of law." (Petition at 18-19). However, a careful reading of these cases actually reveals that they either contain only passing comments on *White* in the form of dicta, or are readily distinguishable on their facts from both *White* and the case at hand.

For example, both *United States v. Johnson*, 971 F.2d 562, 572 (10th Cir. 1992); and *United States v. Jacoby*, 955 F.2d 1527, 1538 (11th Cir. 1992), were business record cases not involving statements by victims of child sexual abuse. In both cases the business records were held admissible under the Confrontation Clause primarily because of their reliability, and *White v. Illinois* was cited only in dicta for the proposition that similar "reliability" was found in the firmly rooted exceptions at issue therein. Likewise, in *United States v. Accetturo*, 966 F.2d 631, 634 n.6 (11th Cir 1992), the court's footnote expressly stated that unavailability was not even an issue in that case, thus making the passing reference to *White* pure dicta. In any event, the *Accetturo* court's comment did not say that *White's* holding was limited only to firmly rooted exceptions. In *Virgin Islands v. Joseph*, 964 F.2d 1380, 1386 n.6 (3d Cir. 1992), unavailability was also not in issue (the out-of-court declarant being dead) and *White* was mentioned solely as a "note in passing." And in *Lowry v.*

*Collins*, 988 F.2d 1364 (5th Cir. 1993), it was found that the proffered out-of-court statement (a video-taped interview of the child witness) simply did *not* have the requisite "indicia of reliability" to make it admissible under the Confrontation Clause. *Id.* at 1370-71. *White* was cited only to distinguish the reliability of its statements from the unreliability of the video at issue in *Lowry*. *Id.* at 1371. It is therefore not surprising at all that the Fifth circuit required live testimony by the otherwise available child declarant therein.

Even *State v. Wicker*, 832 P.2d 127 (Wash. Ct. App. 1992), which appears on the surface to be most contrary to the Eighth Circuit's decision herein, is inapposite because the Washington Court of Appeals never even had to reach the constitutional issue. The hearsay evidence in *Wicker* had already been found not admissible under any exception to the hearsay rule by the court, 832 P.2d at 130, thus rendering that court's footnoted excursion into the Confrontation Clause, 832 P.2d at 130 n.7, an unnecessary dictum.

These examples show that there is no clear conflict among the lower courts over the legal principles in question. Thus, there is no basis for review by this Court.

## IV. THE FACTUAL SITUATION PRESENTED BY THIS CASE IS NARROW AND UNLIKELY TO RECUR ON ANY TYPE OF REGULAR BASIS.

The instant case does not pose an important federal question because of its narrow and unusual set of facts.

The usual situation in cases of child sexual abuse finds the prosecution offering the testimony of the victim as the main pillar of its case. *See, e.g., Maryland v. Craig,* 497 U.S. 836 (1990); and *Coy v. Iowa,* 487 U.S. 1012 (1988). Indeed, given the heavy burden of proof placed upon the prosecution, the vast majority of prosecutors who have direct victim testimony available will usually make every attempt to put those victims on the stand because of its highly probative, not to say dramatic, impact.

On the other hand, it is usually the defense which attempts to prevent such evidence by arguing that the witness is incompetent, or making some other objection.

Here, however, the roles were reversed in a situation that is not likely to recur very often. The prosecution, supported by an expert's opinion, realized from the beginning that B. was the type of very young girl who would not be able to remember or relate at trial the abuse which she had earlier reported happened to her over a year before the trial (1st O.H. 3). Indeed, prior to trial, the defense and the trial court as well assumed her incompetent to testify and thus unavailable. Consequently, there was no thought prior to trial of holding a competency hearing.

But petitioner, in a surprise move on the first day of trial, announced his intention to possibly call B. as a witness (an intention that was not, in the event, fulfilled), thereby causing the trial court to hold a competency hearing. At the end of that hearing B. was unexpectedly found competent, although in finding her so the trial court recognized the strong possibility that B. may not be

able to remember anything (T. 45); and expressly told counsel that neither party had to call her (T. 16).

Given these circumstances it is hardly surprising that the prosecution continued with its planned strategy of not calling B. and instead relying upon other evidence, including B.'s otherwise admissible hearsay statements, to prove its case.

What is surprising, however, is the fact that petitioner did not call B. himself, even though she had been "produced" by the State and was made available for cross-examination by the trial court's competency ruling. As the Minnesota Supreme Court correctly recognized in *Larson I*, 453 N.W.2d at 45-46, this was an implicit admission by petitioner that the utility of confronting B. at trial was too remote to invoke constitutional concern over her "availability," citing *United States v. Inadi*, 475 U.S. 387, 396-98 (1986).

Clearly, this case presents a very narrow, if not unique, set of facts. Because it is highly unlikely to recur on any sort of regular basis, the question is not an important one for this Court to review.

## CONCLUSION

For all the above reasons, respondent respectfully asks that the petition for a writ of certiorari be denied.

Respectfully submitted,

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